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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1857

ALCOA STEAMSHIP COMPANY, INC. (a New York Corporation),
Petitioner,

—against—

M/V NORDIC REGENT, her boilers, tackle, machinery and other appurtenances *in rem,* and NORCROSS SHIPPING CO., INC. (a Liberian Corporation), as her owner *in personam,*
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION AND BRIEF OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

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The Association of Trial Lawyers of America hereby requests permission to file a brief *Amicus Curiae* in the above matter. The Association of Trial Lawyers of America is a national bar association consisting of more than forty thousand lawyers. By the terms of its By-Laws, membership requires that the greater portion of a lawyer's practice be on behalf of plaintiffs in personal injury litigation or workers' compensation. The application to be heard in this case is on behalf of those clients, past, present and future, who make up our collective constituency and represent a large segment of the American public who may be involved with the courts and the litigation process in connection with a personal injury claim.

Many of our members are specially involved representing maritime plaintiffs and aviation plaintiffs, who would be most likely directly affected by the outcome and sequelae from this case. We submit that the brief arguments which we present, and which are based on the collective experience of our members and put forward in the interests of our clients, will be of assistance to the Court.

For the foregoing reasons, it is respectfully prayed that this Honorable Court accept this brief *Amicus Curiae.*

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Questions Presented

I. May a District Court sitting in Admiralty dismiss the Complaint of a local American resident corporation on the grounds of *forum non conveniens?*

II. May purported "*inconvenience*" to the Respondent be balanced, either in justice or in logic, against the prospect of eliminating over ninety percent of Petitioner's recovery by dismissing the Complaint?

III. Should this Court re-examine and restate the doctrine of *forum non conveniens* in the light of present day communications and transportation technology?

POINT I

The American citizenship and local residence of petitioner should be heavily weighted in balancing the factors to be considered on a motion to dismiss on the grounds of *forum non conveniens.*

The motor vessel NORDIC REGENT and the corporate Respondent, Norcross Shipping Co., Inc., are wholly owned by Anglo-Nordic Shipping Co., Ltd. Anglo-Nordic has an office at Avenue of the Americas and 42nd Street in Manhattan. It is a Bermuda corporation, but has mortgaged its fleet of vessels, including the M/V NORDIC REGENT, to Morgan Guaranty Trust Company in New York. It also acts as "*General Agent*" for the corporate owner by which means *in personam* jurisdiction over Norcross was obtained in this litigation. It was Anglo-Nordic which entered into the Charterparty by which the contractual relationship between Petitioner and the vessel was established and circumscribed for the carriage of ore for Alcoa's account. The Charterparty called for litigation forum in the Southern District of New York.

These multi-national vessel interests, who operate their business, and obtain their financing and business customers in New York City, have succeeded in ousting the New York Petitioner from its own United States Court. We will not discuss the frailties of the discretionary legal basis upon which this was done, leaving those arguments to the well-spoken petition-in-chief.

We do wish, however, to explore with the Court the ramifications of the result in this case. Since a corporate party is entitled to equal treatment and standing in our courts just as an individual person, the ruling in question paves the way for individual American citizens to have their litigation relocated out of our courts and into foreign arenas, notwithstanding jurisdiction over a defendant being present.

This will chill our heritage of free access to the courts. And free access is one of the underpinnings of the doctrine of *forum non conveniens* insofar as part of that doctrine is that plaintiff's choice of forum should rarely be disturbed. More often than not, the individual American citizen will sue a foreign defendant in a federal court on a transitory cause of action basing jurisdiction on diversity of citizenship. Procedurally, admiralty was unified with the so-called "civil-side" of the District Courts in 1966. It can be predicted that only a further small step need to be taken by a District Court in its discretion to dismiss an American's diversity suit against a foreigner, if the principles endorsed by the Second Circuit in this case are left standing. Foreign persons and foreign corporations can expect equal justice in our courts. The same cannot be said for American citizens before the courts or legal systems of all of the nations of the world.

We humbly urge that the Court reaffirm the holdings in *Mobil Tankers Co.* v. *Mene Grande Oil Co.*, 363 F.2d 611

(3rd Cir.), *cert. denied,* 385 U.S. 945 (1966), and *Burt* v. *Isthmus Development Co.,* 218 F.2d 353 (5th Cir.), *cert. denied* 349 U.S. 922 (1955), and reverse the Second Circuit Court of Appeals ruling in this case.

POINT II

The prospect of substantial prejudice to the petitioner resulting from dismissal of the case ought not to be equated with considerations of "inconvenience" to the respondent.

The District Court considered the Trinidad forum as possibly "less favorable" under circumstances where it appears the difference in recovery would be in excess of ninety percent. *Fitzgerald* v. *Texaco Inc.,* 521 F.2d 448 (2nd Cir.), *cert. denied,* 423 U.S. 1025, was cited as supporting authority. But *Fitzgerald* is not authoritative. At pp. 452, 453, the Court in that decision dealt with plaintiff's argument that the general maritime law as applied in England would be less favorable to them than the American interpretation. In footnote 6 on page 452, Judge Anderson sets forth his analysis that the interpretations of the duty of an owner to mark a wreck under the general maritime law are essentially the same in the English courts as in American courts. Thus, the court did not weigh the factor of less favorable legal rights in upholding the dismissal, but rather, it found the argument of no merit or application to the circumstances of the case. Reliance upon *Canada Malting Co., Ltd.* v. *Paterson Steamships,* 285 U.S. 413 (1932), in support of this proposition is likewise not well-founded. *Canada Malting* was an all-Canadian litigation wherein it was held to be within the discretion of the District Court to dismiss the case when the litigants were all citizens of the same foreign

state. The Supreme Court left to the Canadian court, where litigation was already pending, the issue whether the American Great Lakes situs of the collision would require the application of American collision law instead of Canadian law.

It is respectfully submitted that the substantial legal prejudice to the Petitioner far outweighed any "inconvenience" to Defendant and the ruling below should be reversed.

POINT III

Restatement of the factors which are left to the discretion of the trial court is required, where the doctrine of *forum non conveniens* is involved.

This Court in *Gulf Oil Corporation* v. *Gilbert,* 330 U.S. 501 (1947), set forth a generalized enumeration of the factors to be considered and the criteria to be followed by trial courts in exercising discretion when applying the doctrine of *forum non conveniens. Gulf* was prior to § 1404(a) of the Judicial Code, Title 28 U.S. Code, but its teachings have survived the statutory enactment which governs transfers within the District Court system. *'The doctrine leaves much to the discretion of the court to which plaintiff resorts . . .'* (330 U.S., page 508) with the understanding that the trial court will be in the best position to develop all of the salient factors which must be considered in making the determination in a particular case. Unfortunately, the District Court in this instance failed to follow elemental guidelines which have been established regarding the precise identification of witnesses who would be subject to inconvenience. (*Factors Etc., Inc.* v. *Pro Arts, Inc.,* 579 F.2d 215, 218 (2nd Cir.,

1978), *cert. denied,* 440 U.S. 908 (1979); *cf. dissent* Van Graafeiland, C.J., A-36, Appendix B, Petition). That would not justify reexamination of the governing criteria, but rather, remand with instructions to follow the criteria.

In *Koster* v. *Lumberman's Mutual Casualty Co.,* 330 U.S. 518, it was stated that, while each case would turn on its facts (p. 528; see also *Williams* v. *Green Bay & Western RR,* 326 U.S. 549, 557), "*Where there are only two parties to a dispute, there is good reason why it should be tried in the plaintiff's home forum if that has been his choice.*" It should then be considered whether the plaintiff's choice of forum constitutes oppressiveness and vexation to the defendant so as to be disproportionate to plaintiff's own convenience. The court's own administrative concerns may also be considered, but it is a fact of life that New York is a pre-eminent commercial, shipping, financial, and legal center, with a consequent high incidence of litigation. Both parties here, essentially, are "New Yorkers".

Since there is no element of oppression in Petitioner's action, it is questionable whether the balancing should be undertaken. But it is respectfully submitted that balance of convenience, insofar as it may be a part of the entire doctrine of *forum non conveniens,* must be considered in modern terms. Routine depositions can be conducted in one day's time between most metropolitan centers in the United States. It is generally easier and less expensive for a lawyer handling a file to fly to a distant location and take testimony rather than hire local counsel who must then become familiar with the file in order to participate.

We are also beyond the threshold of the great advances in communication and electronics and, specifically, we refer to the videotaped deposition. It has been a long-time

established practice particularly in admiralty cases to rely extensively for proof at trial on depositions, and advances in technology have made television more economical and thus it will become an increasingly utilized tool in the judicial process.

On the other hand, it can be argued that the trial courts are in the best position to perform the cost analyses which may be required to weigh the balance of convenience, which would militate against the court speaking again on this issue. But there was in this case a number of discretionary errors made which now carry the imprimatur of the Second Circuit, and this in our humble opinion requires reversal. The case also presents the opportunity to restate the doctrine, and the call of Circuit Judge Oakes (concurring in the dissent, A-32, Appendix B) for just such reexamination should be acted upon.

CONCLUSION

The erroneous dismissal of the American Petitioner's case from its own local District Court requires reversal. The far-reaching effect of the decision below and modern transportation and communication technology requires this Court to review the court-made doctrine of *forum non conveniens*.

Respectfully submitted,

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